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No. _____

In The

Supreme Court of the United States

October Term, 1997

BRUCE R. BLACK,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is 18 U.S.C. §2252(a)(2) and (4) unconstitutional in violation of the Eighth Amendment cruel and unusual punishment clause as applied to criminalize and punish a person adjudicated to suffer involuntarily the status of pedophilia/ephebophilia, the pathology of which is restricted to the receipt, collection and transmission of depictions of child pornography, without monetary or other consideration and without any history or medical prognosis of predation or danger to others?

2. Should U.S.S.G. §§5K2.0 p.s. and 5K2.13 apply to and require a downward sentencing departure where the commission of acts in violation of the statute is adjudicated to be pathologically symptomatic of the involuntary status of pedophilia/ephebophilia, when the non-application of those sections is in direct conflict with results in the First and Second Circuits where their application resulted in sentences of probation?

3. Does the rule of lenity exempt from criminalization and incarceration individuals for acts pathologically symptomatic of a person's involuntary status notwithstanding the person's refusal to invoke an insanity defense under 18 U.S.C. §17?

PARTIES IN THE COURT BELOW

Petitioner, Bruce R. Black, was the Defendant in the district court and was the Defendant-Appellant, Cross-Appellee in the United States Court of Appeals for the Seventh Circuit. The Respondent, United States of America, was the Plaintiff in the district court and is the Plaintiff-Appellee Cross-Appellant in the Court of Appeals for the Seventh Circuit.

RULE 29.1 STATEMENT

There are no corporations involved and, therefore, no subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Bruce Black (Petitioner), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of the district court on Petitioner's conditional plea of guilty of violating 18 U.S.C. §2252(a)(2) and (4) and sentencing him to eighteen months incarceration.

OPINIONS BELOW

I.

COURT OF APPEALS

The opinion of the court of appeals (App. A, *infra,*) 1a-13a, is reported at 116 F.3d 198 (7th Cir. 1997). The various opinions and relevant orders of the district court (Baker, J.), Apps. C-H, inclusive, 15a-34a, are not reported.

II.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* 14a), was entered June 9, 1997. Petitioner did not seek rehearing. This petition for certiorari is being brought within 90 days of the judgment of the court of appeals. Petitioner invokes this Court's jurisdiction under and pursuant to 28 U.S.C. §1254(1).

III.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

18 U.S.C. §2252(a)(2) provides:

> "any person who knowingly receives, or distributes, any visual depictions [involving the use of a minor engaging in sexually explicit conduct] that has been . . . transported in interstate . . . commerce . . . shall be . . . fined under this title or imprisoned not more than ten years, or both."

18 U.S.C. §2252(a)(4)(B) provides:

> "any person who knowingly possesses three or more . . . visual depiction[s] that [have] been shipped or transported in interstate . . . commerce . . . involv[ing] the use of a minor engaged in sexually explicit conduct . . . shall be fined under this title or imprisoned not more than ten years or both. . . . "

18 U.S.C. §3143(b)(1)(B) provides as follows:

> "[T]he judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal . . . shall be detained unless the judicial officer finds . . . that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in, (i) reversal; (ii) order for a new trial; (iii) a

sentence that does not include a term of imprisonment; or , (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process."

18 U.S.C. §3143(b)(2) provides that,

"the judicial officer shall order that a person who has been guilty of an offense in a case described in Subparagraph (A), (B) or (C) of Subsection (f)(1) of §3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained."[1]

18 U.S.C. §3156(a)(4)(C) provides:

"as used in §§3141-3150 of this Chapter, . . . (4) the term 'crime of violence' means . . . (C) any felony under Chapter 109A or Chapter 110."[2]

18 U.S.C. §3145(c) provides in relevant part:

"A person subject to detention pursuant to §3143(a)(2) or (b)(2), and who meets the conditions of release set forth in §3143(a)(1) or (b)(1), may be ordered released under appropriate conditions by the judicial officer, if it is clearly shown that here are exceptional reasons why such person's detention would not be appropriate."

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[1] In relevant part, 18 U.S.C. §3142(f)(1) in relation to 18 U.S.C. §3143(b)(2) provides for mandatory detention in a case involving "a crime of violence." A "crime of violence" is defined in 18 U.S.C. §3156(a)(4)(C) as an offense included within the prohibitions of 18 U.S.C. §2251, *et seq.*

[2] 18 U.S.C. §2252 falls within Chapter 110 of the Federal Criminal Code.

U.S.S.G. §5K2.0 p.s. provides in relevant part:

> "Under 18 U.S.C. §3353(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."
>
> . . .
>
> Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate . . .
>
> An offender characteristic or other circumstance that is not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range may be relevant to this determination if such characteristic or circumstance is present to an unusual degree and distinguishes the case from the "heartland" cases covered by the guidelines in a way that is important to the statutory purposes of sentencing.

U.S.S.G. 5K2.13 provides in relevant part:

> "If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public.

IV.

STATEMENT OF THE CASE

Petitioner was convicted on September 27, 1996, on his conditional plea of guilty on nine counts, grouped as one, of receiving, collecting and transmitting child pornography. App. C, 15a-18a. By Stipulation, accepted by the district court, those acts were adjudicated to be pathologically symptomatic of Petitioner's involuntary status as a pedophile/ephebophile. Apps. G, H, I 33a-37a.

The district court's adjudication that Petitioner's acts violative of the statute were pathologically symptomatic of his involuntary status as a pedophile/ephebophile derived from an evidentiary hearing where psychiatrists for the Petitioner and government agreed on that diagnosis. Their testimony was based on examinations of the Petitioner to which they applied the criteria of the American Psychiatric Association's publication entitled, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (4th Ed. 1994).

The government's expert, Jonathan Kelly, M.D., has published in the area of the paraphilias, particularly

pedophilia and ephebophilia. He has written that, "[t]he paraphilias are chronic, not transient, disorders and are characterized by a high recidivism rate, up to 100% in some reports." Kelly, et al. *A Pharmacological Approach to Sexual Deviant Behavior in the Community*, 12 **International Journal of the Sociology of the Family**, 155, 156 (1982). Dr. Kelly has reported that pedophilia/ephebophilia "manifest themselves after puberty;" "their etiologies are often traced to psychological events in childhood but are generally unknown;" "[g]enetic, endocrinologic, or pharmacological factors may be contributory;" and they, "are *qualitative disorders in sexual direction, not quantitative disorders of sexual drive. . . . " Id.*[3]

(Emphasis supplied).

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[3] That language in government's expert Kelly's writing negates the district court's first illustration set forth in footnote six *infra* supporting its view that Petitioner's position was "senseless," the rapist, "driven by involuntary lust for sexual gratification." As Dr. Kelly noted, the paraphilic dysfunction which Petitioner suffers is a qualitative not a quantitative disorder as would characterize the rapist in the district court's example.

Moreover, the DSM-IV demonstrates that the district court's illustrations of the thief, "driven by involuntary kleptomania," App. F, 31a, and the "vehicle operator who commits manslaughter because he is in the clutches of involuntary chemical dependency," *id.* are inapposite to the pathological status and acts incident thereto at bar. See DSM-IV No. 312.32, pp. 612-613 and pp. 175-272 respectively. Justice White's concurring opinion in *Powell v. Texas*, 392 U.S. 514, 548-551 (1968) (White, J. concurring) renders next to impossible the latter by requiring the driver prove a pathological necessity to injest whatever the substance and further prove a pathological necessity to operate a motor vehicle having injested that substance.

In short, Dr. Kelly advised the government in this case that,

> "an individual may not voluntarily choose to become a pedophile or ephebophile in the same manner that a person may not . . . choose to become a claustrophobic or agoraphobic."

App. I, 36a. In the same vein, John Money[4] has likened pedophilia/ephebophilia to the condition of being "left-handed" or "color blind." Money, *Pedophilia, New Phylism Theory as Applied to Paraphilic Lovemaps*, **Pedophilia, Biosocial Dimensions**, Jay Feierman Ed. p.448 (Springer-Verlag, 1990).

Dr. Kelly has reported that the paraphilias, including pedophilia and ephebophilia, "are disorders of sexual behavior, such that *'unusual or bizarre imagery or acts are necessary for sexual excitement.'* " Kelly, *supra*, at 156. (Emphasis supplied). Most importantly, Kelly says, " '[s]uch imagery or acts tend to be *insistently and involuntarily repetitive.'* " *Id.* (Emphasis supplied). That is consistent with the DSM-IV, *supra*, pp.522-523, stating the "diagnostic features" of a pedophilia as,

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[4] John Money, Ph.D. is a Professor of medical psychology and pediatrics at the Johns Hopkins University Medical School and Hospital in Baltimore. There is a plethora of literature dealing with human sexuality in all its aspects as revealed in Posner, **Sex and Reason** (Harvard, 1992). In that literature on the sexual pathologies, Dr. Money is cited in virtually all of them, e.g. by Posner, *supra*, at 309 n.47. See also Eli Coleman, Ph.D., *Compulsive Sexual Behavior: New Concepts and Treatments*, a tribute to John Money, paper delivered at 9th Annual Meeting of the Association of Treatment of Sex Abusers in Toronto, Ontario, November, 1990 (the Haworth Press, Inc. 1991).

> "recurrent, intense sexually arousing fantasizes, sexual urges, or behaviors involving . . . children or other non-consenting persons. . . . *For some individuals, paraphiliac fantasies or stimuli are obligatory for erotic arousal and are always included in sexual activity.*"

(Emphasis supplied).[5]

The district court denied, without written findings, Petitioner's motion for enlargement on bail pending appeal, saying in full:

> "Is there a substantial question in this case? The defendant asserts that he is being punished because he is an unbidden pedophile or ephebophile. He isn't. I have made that quite clear in the rulings. He is punished, he is prosecuted because he possessed, transmitted and received child pornography. That is the offense.

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[5] The DSM-IV, *supra*, says "pathology" and "pathological" refer to

> "clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress . . . or with a significantly increased risk of suffering death, pain, disability or an important loss of freedom."

DSM-IV, *supra*, Introduction at xxi. For a deviant behavior to be "pathological," it, "must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual." *Id.* at xxi-xxii.

Both federal and state appellate courts have appreciated "pathology" as connoting disease, disease related, or disease created conditions. See *United States v. DiDomenico*, 985 F.2d 1159, 1161-1162 (2nd Cir. 1993); *Williams v. Scudder*, 131 N.E. 481, 483 (S.Ct. Ohio 1921); *Bacon v. United States*, 25 N.E. 399, 400 (N.Y.Ct. App. 1890); Stedmans Medical Dictionary, p. 1312, (26th Ed. 1995).

> Not that he is a pedophile or even an ephebophile. And his claim that he did it because he couldn't help himself is not going to result in a reversal or change in sentence."

App. E, 28a-29a.[6] Petitioner had been free pending trial and sentencing. The district court found after his plea of guilty but before sentencing that, "the evidence is clear and convincing that [Petitioner] will not flee and he offers no overt threat to society." App. K, 44a, *infra*.

At sentencing, the district court said that,

> "[Petitioner] has made no attempts at predation, no attempt at financial gain. . . . he spent his time looking. He didn't produce materials. He didn't sell them. He had no pecuniary motivations. He didn't commit any overt act himself."

App. E, 26a, 27a. The district court denied Petitioner a downward sentencing departure sufficient to warrant probation because,

> "[he] was not suffering from diminished mental capacity at the time he committed the offenses and does not qualify for a downward departure under U.S.S.G. §5K2.13. . . . In the same vein, mental and emotional conditions (pedophilia/ephebophilia) are not appropriate reasons for departure. See U.S.S.G. §5H1.3."

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[6] In its "Tentative Findings" on the government's and Petitioner's objections to the Presentence Report prior to sentencing, the district court said Petitioner's position was "senseless" as illustrated by the "rapist" "driven by involuntary lust;" the "thief" "driven by involuntary kleptomania;" and a "vehicle operator," committing manslaughter while in the "clutches of involuntary chemical substance dependency." App. F, 31a.

App. F, 30a, 31a. In its "Order" resulting in Petitioner's conditional plea of guilty, the district court said,

> "It is clear that [Petitioner] is not claiming insanity as a defense as that term is defined in 18 U.S.C. §17. [Petitioner] does not contend, within the meaning of §17, that his psychological condition of pedophilia or ephebophilia rendered him unable to appreciate the nature and quality of wrongfulness of his conduct."

App. J, 38a-39a. The Seventh Circuit denied without opinion Petitioner's request for bail pending appeal. This Court denied certiorari before judgment on March 24, 1997, *Black v. United States*, ___ U.S. ___, 117 S.Ct. 1329 (1997), no. 96-1330, directed to the constitutionality of 18 U.S.C. §3143(b)(1)(B).

V.

REASONS FOR GRANTING THE WRIT

A.

The Judgment of the Court of Appeals is Contrary to This Court's Precedents Establishing that the Cruel and Unusual Punishment Clause of the Eighth Amendment Prohibits the Prosecution and Punishment of Persons on Account of Involuntary Statuses and Involuntary Acts Pathologically Symptomatic of Those Statuses

This Court in *Robinson v. California*, 370 U.S. 660 (1962), held that the Eighth Amendment cruel and unusual punishment clause prohibited the conviction and punishment of an individual for the involuntary status or condition of drug addiction. In *Powell v. Texas, supra*, a plurality of the Court held that the *Robinson* rule did not apply to acts which were not shown to be part of the

involuntary status of alcoholism. The plurality said the record in *Powell, supra,* did not demonstrate either that defendant's alcoholism or other situation required that he be in public while intoxicated.

Justice White provided the fifth vote supporting the plurality result in *Powell, supra.* But, his concurring opinion, logically included within the position of the four dissenting justices "on the narrowest grounds", *Marks v. United States,* 430 U.S. 188, 193 (1977), stated as follows:

> "The fact remains that some chronic alcoholics must drink and hence must drink *somewhere.* Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic condition than of disease, although the disease may lead to destitution and perpetuate that condition. *For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible.* As applied to them, this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment – the act of getting drunk."

Powell, supra, 392 U.S. at 551, (Emphasis in original as to "somewhere;" otherwise supplied).[7]

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[7] In *Kansas v. Hendricks,* ___ U.S. ___, 117 S.Ct. 2072, 2079 (1997), the Court authoritatively recognized that mental health professionals who evaluated the respondent in *Hendricks,*

The position Petitioner asserts has not been addressed by this Court since the plurality opinion in *Powell v. Texas, supra.* Justice White's concurring opinion provided the fifth vote to support the plurality. But, Justice White's concurring opinion in *Powell* accepted the

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> "diagnosed him as suffering from [a variant] of pedophilia, a condition the psychiatric profession . . . classifies as a serious mental disorder . . . [resulting in] a lack of volitional control . . . [and] a prediction of future dangerousness. . . . "

This Court held that such pedophilia coupled with a lack of volitional control and "prediction of future dangerousness" justified civil as opposed to criminal commitment. *Id.*

The medical authorities demonstrated, and the district court adjudicated, Petitioner's variant of pedophilia revealed no history of predation and no danger to the community ("He was passive. He didn't produce materials. He didn't sell them. He didn't commit any overt act himself." App. D, 21a; App. E, 26a.) The district court further found in enlarging Petitioner on bail pending sentencing, "that the evidence is clear and convincing [the Petitioner] will not flee and he offers no overt threat to society." App. K, 44a.

It seems anomalous that a certifiably dangerous person as Hendricks can be civilly committed whereas one who is and has been both psychiatrically certified and adjudicated as "not dangerous," not having profited or sought profit and doing those passive acts his pathology rendered him volitionally incapable of avoiding, can be criminally punished. To the extent predation and dangerousness might be suggested as pathologically symptomatic of someone such as Hendricks' pedophilia, civil commitment under a "sexually dangerous" statutory provision is an option for diverting such persons from the penal and retributive goals of the criminal law to the remedial goals of the civil law. Civil commitment, or preferably, mandatory out-patient treatment as recommended by government expert Kelly for Petitioner in this case seems a reasonable alternative to criminalization and incarceration.

basic premise of the four dissenting justices who would have applied *Robinson, supra,* to void Powell's conviction. That situation, the court below believed, destroyed *Powell's* precedential support for Petitioner's position. App. A, 6a n.2.

Petitioner submits Justice White's concurring opinion in *Powell,* logically encompassed "on the narrowest grounds," *Marks, supra,* 430 U.S. at 193, within the four justice dissent in *Powell,* provides the point of departure for addressing that fundamental question of where the line is or can be drawn between an involuntary status which is constitutionally immune from criminalization and punishment and acts committed incident or coincident to that status which are not.

As the decision in *Powell, supra,* was by a fragmented Court, "and no single rationale explaining the result enjoy[ed] the assent of five justices. . . . " *Marks, supra,* 430 U.S. at 193, the general rule is that,

> " 'the holding of the Court may be viewed as that position taken by those members of the Court who concurred in the judgment on the narrowest grounds. . . . ' "

Marks, supra, 430 U.S. at 193. Justice Souter applied the *Marks* test in his concurring opinion in *Waters v. Churchill,* 511 U.S. 661, 685 (1994). But, in *Waters,* Justice Souter seemed to add a reasonable twist to the *Marks* rule demonstrating that a plurality opinion for the Court can be judged as a holding of the Court required to be applied by the lower federal courts by ascertaining the assent of five justices, whether concurring in the judgment or not,

to a particular rationale critical to a central proposition for which the case stands. *Waters v. Churchill, supra,* involved public employee speech, where the public employer did not know the content of the speech and hence, whether the speech was on a matter of public concern and, therefore, presumptively protected. The plurality held the employer was required to undertake a "reasonable inquiry" to determine the content of the speech and whether, on the basis of that inquiry, determined the speech was or was not on a matter of public concern and, therefore, presumptively protected or not protected.

Justice Souter wrote persuasively that the *Waters'* plurality's "reasonableness test" should be understood as the holding of the Court as it was joined by the two justices dissenting from the plurality opinion, thereby creating a 6-3 majority on that test. *Waters, supra,* 511 U.S. at 685 (Souter, J. concurring). Therefore, Petitioner submits Justice White's opinion concurring in *Powell,* as explained in both *Marks, supra* and, Justice Souter's concurring opinion in *Waters v. Churchill, supra,* may be considered the holding of the Court in *Powell, supra.* Justice White's concurring opinion in *Powell* reflects the "position taken by [five] members who concurred in the [rationale] on the narrowest grounds." *Marks, supra,* 430 U.S. at 193; *Waters, supra,* 511 U.S. at 685 (Souter, J. concurring).

Petitioner respectfully submits, the Seventh Circuit avoided the critical issue as to the constitutionality of criminalizing and punishing persons on account of acts adjudicated to be pathologically symptomatic of an involuntary status by relegating that issue to a footnote, suggesting Justice White's concurring opinion in *Powell* stood

alone and without judicial support. App. A, 6a, n.2. Petitioner submits the Seventh Circuit's dismissal to irrelevance of Justice White's concurring opinion in *Powell* on such an important question demonstrates the Seventh Circuits misunderstanding and the need for this Court's review.

Therefore, Petitioner submits the holding below is directly contrary to the governing precedent of *Powell v. Texas, supra.* At the very least, the holding below exposes a vacuum in the law on the fundamental constitutional question as to the extent to which acts pathologically symptomatic of an involuntary status can be said to be distinct from that status and thereby permit the criminalization and punishment of the person suffering the status and committing proscribed acts symptomatic of the status. As that question has not been addressed by the Court over the past thirty years, this case illustrates the importance of this Court's reviewing the decision below.

B.

This Case Presents an Important, Recurring Question Which Has Not Been Addressed by This Court Since Its Plurality Opinion in *Powell v. Texas*, Which Opinion, In Light of Justice White's Concurring Opinion Providing the Majority for the Judgment, Has Allowed Disparate and Conflicting Results, Exemplified by the Result Below, as to the Extent to Which Acts Adjudicated to be Pathologically Symptomatic of a Status Are Exempt from Prosecution and Punishment Under the Eighth Amendment Cruel and Unusual Punishment Clause

Demonstrating that Justice White's concurring opinion in *Powell v. Texas* is and has been considered the

holding of the Court in *Powell v. Texas* is the fact that lower federal courts since 1969 have followed Justice White's concurring opinion in *Powell, supra,* as expressive of the law in the context of ordinances or statutes prohibiting the incidents of the status of "homelessness." See *Pottinger v. City of Miami,* 810 F. Supp. 1551, 1553-1562 (S.D. Fla. 1992), remanded on limited grounds, 40 F.3d 1155 (11th Cir. 1994) and *Johnson v. City of Dallas,* 860 F. Supp. 344, 350-351 (N.D. Tex. 1994), reversed on lack of standing grounds, 61 F.3d 442 (5th Cir. 1995). The California Supreme Court in *Tobe v. City of Santa Anna,* 9 Cal. 4th, 1069, 40 Cal. Rptr. 402 (1995), however, did reverse trial and appellate courts which had struck down ordinances outlawing various acts incident to the status of "homelessness." But, the California Supreme Court refused to accept the position that "homelessness" was an involuntary status as it held was required by this Court's decision in *Robinson v. California, supra.*

There is significant academic writing on this subject. An early example is Greenawalt, *Uncontrollable Actions and the Eighth Amendment: Implications of Powell v. Texas,* 69 Col. L.Rev. 927 (1969); a later one is, Walters, *No Way Out: Eighth Amendment Protection for Do or Die Acts of Homeless,* 62 U.Chi. L.Rev. 1619 (1995). Both support Petitioner's position in this case. For example, Greenawalt, *supra,* writes at 977-978,

> "Though the issue posed in *Powell* is a close one, my judgment is that the Court should go as a matter of constitutional law as far as Justice White would. It should acknowledge that there are some persons who can present persuasive evidence that their craving a drink leaves them

> truly powerless, and it should recognize that the unfairness of punishing such persons for public intoxication is not outweighed by strong countervailing reasons."

Cf. Walters, *supra* at 1628-1631. The foregoing squares directly with the medical facts adjudicated to have pathologically defined and caused Petitioner's actions as symptomatic of his variant of his involuntary status of pedophilia/ephebophilia.

The district court in this case dismissed *Powell's* holding as expressed in Justice White's concurring opinion out of hand. The court of appeals elided *Powell's* holding so expressed by condemning it to judicial irrelevance. Those circumstances demonstrate the necessity of this Court's reviewing this case and addressing the theory underlying Justice White's opinion for five members of the Court in *Powell, supra.* For the Court not to review this case would leave the doubts expressed by the court below intact, causing further confusion where there should be none.

C.

The Decision Below Affirming the District Court's Refusal to Apply U.S.S.G. §§5K2.0 p.s. and 5K2.13 to Require a Downward Departure Where the Commission of the Acts Proscribed by the Statute was Adjudicated to be Pathologically Symptomatic of an Involuntary Status is in Direct Conflict With Results in the First and Second Circuits Involving the Same Offense, the Same Pathology, and Where the Application of Those Guidelines Resulted in Sentences of Probation, Thereby Creating Disparate Results in Sentencing Based Only on Geography and Contrary to the Nationwide Uniformity Purportedly the Goal of the Sentencing Guidelines

This Court in *Koon v. United States*, ___ U.S. ___, 135 L.Ed.2d, 392, 418 (1996), quoting U.S.S.G. §5K2.01 p.s. said that the Sentencing Guidelines, " 'place no limits on the number of potential factors that may warrant departure. . . . ' " In *Koon, supra,* this Court applied U.S.S.G. §5K2.0 p.s. to hold the Ninth Circuit erred in denying defendants a downward departure based on their police officer statuses and consequent susceptibility to abuse in prison.

In two recent cases involving prosecutions under 18 U.S.C. §2252(a), the First and the Second Circuits have articulated principles under U.S.S.G. §§5K2.0 p.s. and 5K2.13 which permitted defendants sentences of probation under the same circumstances presented in this case. *United States v. Gifford*, 17 F.3d 462 (1st Cir. 1994) and *United States v. Barton*, 76 F.3d 499 (2nd Cir. 1996). In *Gifford, supra,* the First Circuit reversed a sentence to imprisonment saying that defendant's "psychological condition" permitted a downward departure under

U.S.S.G.6 §§5K2.0 p.s. and 2.13. In *Barton, supra,* the Second Circuit reversed a sentence of probation on the basis that the district court's findings insufficiently demonstrated "atypicality." *Barton, supra,* 76 F.3d at 503.[8]

The Sentencing Guidelines are designed to establish national sentencing uniformity. The district court's judgment affirmed by the Seventh Circuit's sentencing Petitioner to prison is in direct conflict, on the same facts, with *Gifford, supra,* and *Barton, supra.* This case requires this Court's intervention to resolve a clear conflict between the circuits and to reestablish the goal of substantial uniformity nationwide in federal sentencing.

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[8] The record of the district court in *Gifford, supra* and *Barton, supra,* on remand, are in the record before the district court and the court of appeals, *United States v. Gifford,* no. 92-10132-01. United States District Court for the District of Massachusetts, and *United States v. Barton,* no. 3: 94CR229, United States District Court for the District of Connecticut, respectively. The defendants in *Barton, supra,* and *Gifford, supra,* made only generalized references to "psychological or emotional conditions." The academic authorities cited in the record in this case suggest that both were probably pedophiles or ephebophiles or both. The record in this case shows that other than criminal pornographers motivated by pecuniary gain, pedophiles and ephebophiles are the only people who can find interest in depictions of child pornography. Petitioner's circumstances are, accordingly, no different from those in *Barton, supra,* and *Gifford, supra.*

D.

The Decision Below is in Conflict With This Court's Precedents Applying the Rule of Lenity to Exempt from Criminalization Persons Whose Commission of Acts Proscribed by the Federal Criminal Code Were Adjudicated to be Pathologically Symptomatic of an Involuntary Status and Consequently Without the Presence of Any "Vicious Will" or Other *Mens Rea* Requisite to Criminal Liability

A distinguished line of this Court's precedents[9] pay homage to a fundamental principle undergirding our common law heritage that criminal liability, "generally requires a 'vicious will.' " *Staples v. United States*, 511 U.S. 600, 616 (1993), quoting Blackstone, Commentaries 21. Petitioner acknowledges that 18 U.S.C. §2252(a)(2) requires a *mens rea* in the form of criminal knowledge. *United States v. X-Citement Video Inc., et al.*, 513 U.S. 64 (1994). He acknowledges that the statute prohibits conduct which can be vicious, horrible and damaging beyond description and deserves harsh punishment.

In 1984, Congress eliminated from the prohibitions of 18 U.S.C. §2252, the requirement of a commercial motive. In 1988, Congress added receipt and transmission by computer to the means of trafficking in child pornography. When Congress criminalized transmission by computer without adding commercial motive, intent to

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[9] *United States v. Baliant*, 258 U.S. 250, 251 (1922); *Morrissette v. United States*, 342 U.S. 246, 250 (1952); *United States v. United States Gypsum Company*, 438 U.S. 422, 436-437 (1978); *Liparota v. United States*, 471 U.S. 419, 423-426 (1985); and *Staples v. United States*, 511 U.S. 600, 604-606, 616-618 (1993).

exploit, or some other element evidencing venality, corruption, or predation, it criminalized conduct in which pedophiles like Petitioner would pathologically engage to the extent of its accessibility.

Petitioner submits this Court's precedents and the legislative history of 18 U.S.C. §2252 require application of the rule of lenity to exempt those like Petitioner from criminalization for acts within their pathology. Those acts involve individuals governed by a "qualitative disorder in sexual direction," Kelly, *supra*, availing themselves of images and pictures in venues akin, because of the computer technology, to those historically protected, such as the public domain, the public forum and, the private home. Cf. *Stanley v. Georgia*, 394 U.S. 557 (1969) recently reaffirmed in *Jacobsen v. United States*, 503 U.S. 540, 551-552 (1992), ("a person's inclinations and 'fantasies' . . . are his own and beyond the reach of government. . . . ' ").

CONCLUSION

For the reasons above stated the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAW OFFICES OF JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797

Appendix

A: Slip Opinion: June 9, 1997 ..... 1a

B: Judgment from Court of Appeals: June 9, 1997 ..... 14a

C: Judgment in a Criminal Case: September 27, 1996 ..... 15a

D: Order on Final Disposition: September 30, 1996 ..... 19a

E: Portion of Report of Proceedings: September 27, 1997 [sic] 24a

F: Order on . . . Tentative Findings and Resolution of Disputed Facts Pursuant to U.S.S.G. § 6A1.3(b): September 19, 1996 ..... 30a

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H: Stipulation: June 3, 1996 ..... 34a

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L: Order: May 9, 1996 ..... 46a

M: Emergency Motion Pursuant to Rule 9(b) . . . October 29, 1996 ..... 51a

N: Letter from William Suter: November 14, 1996 ..... 53a

APPENDIX A

In the
United States Court of Appeals
for the Seventh Circuit

Nos. 96-3497 and 96-3772

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Cross-Appellant,

v.

BRUCE R. BLACK,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 95 CR 20053 – **Harold A. Baker,** *Judge.*

ARGUED APRIL 18, 1997 – DECIDED JUNE 9, 1997

Before CUMMINGS, MANION and DIANE P. WOOD, *Circuit Judges.*

CUMMINGS, *Circuit Judge,* Defendant Bruce R. Black was charged in a nine-count indictment with distribution, receipt and possession of child pornography in violation of 18 U.S.C. § 2252(a)(2) and (4).[1] Black's motion to dismiss was denied after an evidentiary hearing, and the

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[1] Counts 1 and 5 referred to the defendant's distribution of visual depictions of minors engaging in sexually explicit conduct that had been transported in interstate commerce.

parties thereafter entered into three stipulations described *infra*. Black entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. Black was sentenced to 18 months' imprisonment plus three years of supervised release, and his computer equipment was declared forfeited.

Facts

After receiving information from a private citizen, the Federal Bureau of Investigation looked into the transmission of child pornography by computer through America Online (AOL), a commercial computer service located in Vienna, Virginia. Its electronic message bulletin board enables subscribers to send messages to each other and attach files containing pictures. A grand jury subpoena was served on AOL for its records associated with a user who identified himself on the bulletin board as "B FOX 332." AOL's records revealed that the account belonged to Bruce Black. At the time, Black was living in an apartment in Champaign, Illinois, and was employed by the Prairielands Counsel of the Boy Scouts of America.

Counts 2, 3, 4, 6, 7 and 8 involved the defendant's receipt by computer of visual depictions transported in interstate commerce showing minors engaging in sexually explicit conduct. All eight of these counts alleged violations of 18 U.S.C. § 2252(a)(2). Count 9 charged that defendant possessed depictions which had been transported in interstate commerce and involved the use of a minor engaging in sexually explicit conduct. 18 U.S.C. § 2252(a)(4)(B). Finally, the indictment requested forfeiture of Black's personal computer equipment pursuant to 18 U.S.C. § 2253.

A search warrant was executed on AOL, yielding subscriber information and detailed billing records for defendant's account, which had been activated 146 times from January 1, 1995 to June 16, 1995. The records revealed both distribution and receipt of files by defendant. On five occasions he was the originator of several child pornography files on to the AOL system (*i.e.*, he was the AOL subscriber who first "uploaded" the image on to the system), on six other occasions he received such files, and on two other occasions he distributed such files by forwarding the images he received to another AOL subscriber.

In August 1995, FBI agents went to Black's apartment to execute their search warrant, but Black himself consented to the search, which resulted in the seizure of seven three-ring binders containing numerous printed photographs of child pornography showing minors engaging in sexually explicit acts. Besides the binders in his bedroom, the FBI agents found a personal computer system with a printer and 350 computer diskettes. A Board-certified pediatrician, Dr. Kathleen Buetow, examined some of the pictures of male children found in Black's residence and stated that 20 of the 40 images she reviewed were of pre-pubescent children.

Black consented to be interviewed by the FBI agents and admitted that he owned the personal computer system, was a subscriber to AOL and ordinarily used the screen name B FOX 332. He admitted that he regularly received and occasionally disseminated images via computer depicting children in sexually explicit conduct. He referred to this material as "child pornography" or "kiddie porn" and said he had retained everything he

received and kept most of it in the ring binder albums stored in his bedroom.

Black's motion to dismiss the indictment was denied and at another hearing regarding subsequent motions, Black stated that he was not offering an insanity defense under 18 U.S.C. § 17.

On June 3, 1996, the government and Black entered into three stipulations. The first agreed that Black "was a pedophile and/or ephebophile [sexually attracted to young men]" and that "the receipt, collection and distribution of child pornography was a pathological symptom of the defendant's pedophilia and/or ephebophilia." The second was that Black "did not receive, collect or distribute child pornography for commercial purposes or monetary gain" and that he "did not trade child pornography on a numerically equal basis with other individuals who received, collected or distributed child pornography." The third provided that "the graphic images of child pornography charged in the indictment were received or distributed by the defendant . . . [and had] traveled in interstate commerce." On the same date, the parties entered into a plea agreement under which the defendant entered a plea of guilty to all nine counts of the indictment.

At the subsequent sentencing hearing, the government sought a five-point increase in Black's offense level pursuant to Sentencing Guideline § 2G2.2(b)(2) due to his distribution of child pornography. Black objected to the enhancement, and the district court agreed that it should not apply because of the absence of pecuniary gain.

Thereafter Black was sentenced to 18 months' imprisonment plus three years of supervised release.

I. Black's prosecution was not in violation of the Eighth Amendment

Black argues that his prosecution under 18 U.S.C. § 2252 is unconstitutional under the Eighth Amendment because he is a pedophile or ephebophile. Relying on *Robinson v. California*, 370 U.S. 660 (striking down as unconstitutional a California statute criminalizing the status of being addicted to narcotics), and Justice White's concurrence in *Powell v. Texas*, 392 U.S. 514, Black maintains that he has been convicted based on his status as a pedophile or ephebophile. However, the indictment does not criminalize him in that capacity but simply charges him for his conduct of receiving, possessing and distributing child pornography that traveled in interstate commerce. Thus *Robinson* is simply inapposite on its face because the statutes involved here do not criminalize the statuses of pedophile or ephebophile.

Black is not raising an insanity defense under 18 U.S.C. § 17 but claims that he is immune from prosecution under 18 U.S.C. § 2252 because as a pedophile or ephebophile he is compelled to collect, receive and distribute child pornography. A similar argument was rejected with respect to public intoxication in *Powell v. Texas*, 392 U.S. 514. In *Powell*, the defendant argued that under the Court's decision in *Robinson v. California*, 370 U.S. 660, his conviction for public intoxication was barred by the Eighth Amendment because it effectively criminalized his status as a chronic alcoholic. A majority of the

justices concluded that *Robinson* did not control the outcome of the case because Powell was subject to criminal sanctions "not for being a chronic alcoholic, but for being in public while drunk on a particular occasion." 370 U.S. at 532; see also *id.* at 553-554 ("Powell showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.") (White, J., concurring).[2] Similarly, although Black may have shown – indeed it is stipulated – that he is a pedophile and/or ephebophile and that his receipt, distribution and possession of child pornography "was a pathological symptom of [his] pedophilia and/or ephebophilia," he did not show that this charged conduct was involuntary or uncontrollable. Indeed, various of the psychological reports contained in the record indicate that defendant could control his impulses to access child pornography. In particular, a summary report prepared by the government's expert, following a 4¾-hour interview with defendant notes,

> Statements made by Mr. Black in the course of his evaluation indicate that he was able to appreciate the nature and quality and the wrongfulness of his acts, relative to involvement with child pornography. History provided by Mr. Black also indicates that he did not suffer a reduced mental capacity from the presence of a

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[2] Defendant's principal reliance is on the concurring opinion of Justice White in *Powell v. Texas*. However, since no other Justice joined in that opinion, it need not be discussed further.

> mental disorder that interfered with his knowingly, purposely, and voluntarily committing the alleged offenses. History provided by Mr. Black also indicates he was able to resist sexually deviant urges and impulses related to his involvement in the child pornography activities.

Another report indicates that Black confined his computer access to child pornography to periods when his roommate was away from the apartment. Simply put, Black did not show that his child pornography offenses were involuntary and uncontrollable because he is a pedophile or ephebophile. We note in this regard that we have carefully reviewed all of the psychiatric and psychological literature excerpts that Black has submitted to the Court and find no basis in this literature for concluding that Black's charged conduct was involuntary or otherwise uncontrollable.

II. Court's rejection of request for a downward departure

Defendant claims that the district court committed error in rejecting his request for a downward departure under the application of U.S.S.G. § 5K2.0 (other grounds for departure) or § 5K2.13 (diminished capacity). Unlike *United States v. Gifford*, 17 F.3d 462 (1st Cir. 1994) (remanding for resentencing where district court apparently harbored the mistaken impression that it lacked legal authority to depart from guideline range), the court did consider Black's arguments for a downward departure and rejected them (R. 56) and its decision not to depart is unreviewable. *United States v. Prevatte*, 66 F.3d 840, 843 (7th Cir. 1995).

Black relies upon *United States v. Barton*, 76 F.3d 499 (2d Cir. 1996), but there the Second Circuit reversed the district court's granting of downward departures based upon the defendant's mental and emotional condition. Here the district judge was fully aware of defendant's mental condition and efforts toward rehabilitation. Furthermore, the record as a whole shows that the judge knew he had the discretion to depart on the basis of that mental condition, notwithstanding his isolated comment in the order of September 17, 1996, in which he said that "mental and emotional conditions . . . are not appropriate reasons for departure," and cited U.S.S.G. § 5H1.3. That section of the Guidelines confirms that mental and emotional condition is indeed not ordinarily relevant. Here, the remainder of the order went on to discuss why Black was not atypical and thus did not deserve the departure. The court's oral comments at sentencing further underscore the point that he knew he had discretion to depart, but that he believed a departure was unwarranted. In these circumstances, the judge was entitled to exercise his discretion and to reject the request for downward departures. See *Barton*, 76 F.3d at 502.

III. Rule of lenity is no bar

Black also contends that the rule of lenity bars his prosecution under 18 U.S.C. § 2252. However, no grievous ambiguity or uncertainty has been shown in the statute involved here, so that the rule of lenity is inapplicable. *Chapman v. United States*, 500 U.S. 453, 463. Since 1984, a commercial motivation element was eliminated from the statute (98 Stat. 204). As we held in *United States*

v. Andersson, 803 F.2d 903, 906 (1986), certiorari denied, 479 U.S. 1069, 18 U.S.C. § 2252 "extends to any mailing or receipt of pornographic literature involving children: commercial or non-commercial, public or private." *New York v. Ferber*, 458 U.S. 747, 758-759, noted that broad legislative enactment was necessary to prevent child abuse. Furthermore, § 2252 now expressly includes distribution "by any means including by computer," and it does not incorporate special limitations on computer distribution. Defendant has not shown that this statutory language is ambiguous or requires proof of a commercial motivation. *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988). Congress wished to cover distribution by individuals even if by gift or exchange. *United States v. Andersson*, 803 F.2d at 906. It is no defense that Black may have had a personal opinion about the legality of sexually explicit videos. *United States v. Knox*, 32 F.3d 733, 754 (3d Cir. 1994), certiorari denied, 115 S. Ct. 897; see *United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989).

IV. *District court's refusal to enhance Black's sentence under U.S.S.G. § 2G2.2(b)(2)*

The government complains that the district judge should have accepted its recommendation and that of the reporting probation officer that the five-level enhancement prescribed in U.S.S.G. § 2G2.2(b)(2) be imposed. According to the government, the word "distribution" used in § 2G2.2(b)(2) should be interpreted in accordance with Application Note 1 to that guideline, which says that "[d]istribution, as used in this guideline, *includes* any act

related to distribution for pecuniary gain, including production, transportation, and possession with intent to distribute." (Emphasis added.) The government reads the word "includes" as an indicator that some forms of distribution not for pecuniary gain are also covered by the guideline, whereas Black urges us to read it as shorthand for "should be defined as." We think that Black has the better of this argument. Most importantly, § 2G2.2(b)(2) measures the number of levels of an enhancement by the "retail value of the material," which implies a transaction for pecuniary gain. In addition, the government's interpretation of the word "includes" strikes us as strained. We note, however, on the other hand that pecuniary gain is a broad concept itself, and it does not exclude the possibility of swaps, barter, in-kind transactions, or other valuable consideration. In light of the second stipulation with Black, however, this is clearly a case where the distribution was not for any kind of gain. Under the facts of this case, the five-level enhancement was not available, and the district court correctly refused to impose it.

Judgment affirmed.[3]

MANION, *Circuit Judge*, concurring in part and dissenting in part. I concur with the court's decision to affirm Black's conviction. But regarding the sentence, I would reverse the district court and would remand for resentencing. The Department of Justice has filed a cross-appeal, and I would remand on that basis.

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[3] Defendant's attack before us on the constitutionality of 18 U.S.C. § 3143(b)(1)(B) is hereby rejected. His petition for certiorari raising the same question was denied by the Supreme Court on March 24, 1997.

The court's opinion stresses an important (and dispositive) point – that Black was a frequent user of the Internet both to view and to dispense child pornography.

> "The [AOL] records revealed both *distribution* and receipt of files by defendant. On five occasions he was the originator of several child pornography files onto the AOL system (*i.e.*, he was the AOL subscriber who first "uploaded" the image on to the system), on six other occasions he received such files, and on two other occasions he *distributed* such files by forwarding the images he received to another AOL subscriber."

Ante at 2-3 (emphases added).

So, we agree that Black "distributed" child pornography. U.S.S.G. § 2G2.2(b)(2) is unequivocal on this issue. "If the offense involved *distribution*, increase by the number of levels from the table in § 2F1.1 corresponding to the retail value of the material, but in no event by less than five levels." (Emphasis added.) Thus, even if the child pornography is worth less than $40,000,[1] the Guidelines mandate a five-level increase when the distribution of child pornography is involved. This also distinguishes

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[1] Section 2F1.1 sets out a graduated scale of progressively increasing offense levels designed to punish offenders based on the amount of loss in fraud cases involving forgery and counterfeiting. The cross-reference to this section for sexual exploitation of minors targets large distributors who could be trafficking in pornography worth hundred of thousands, even millions, of dollars. By placing a minimum on the level increase at five (which happens to be $40,000 to $70,000 under § 2F1.1), Congress is stressing that regardless of the retail value, if any, distributors of child pornography must receive a *minimum* five-level increase.

the offense of distribution from mere receipt. Even if the retail value is negligible or not discernible, the Guidelines in effect at the time of Black's sentencing imposed a base offense level of 15 for receiving child pornographic material. A distributor of the same or similar material involving the exploitation of minors gets no less than a five-level increase. Distributors of pornographic material that has no ascertainable value, but is nevertheless harmful, cannot bypass the Guidelines.

And there is no reason to believe that Application Note 1 requires the government to prove that the defendant distributed his pornography to others "for pecuniary gain." While the note states that distribution "includes" any act related to distribution for pecuniary gain, the note should not be interpreted as limiting the types of distribution that are subject to the enhancement. (The Guidelines themselves define "includes" as a term of illustration, not limitation. *See* U.S.S.G. § 1B1.1, Application Note 2 ("[t]he term 'includes' is not exhaustive").) In fact, the note is quite expansive. Its purpose is to instruct courts that *where there is a pecuniary motive,* distribution includes *related* acts – production, transportation, possession with intent to distribute – that ordinarily are not considered acts of distribution. In other words, the Application Note *enlarges* the scope of activity subject to the enhancement. In cases like this one, it certainly should not be read to take away an enhancement mandated by the simple and unqualified language of § 2G2.2(b)(2). Moreover, it is worth noting for future cases that "pecuniary gain" itself is a broad concept, and retail sales are but one way to create value. A distributor may barter or trade for images on the Internet, perhaps

even as a member of a pornographic trading club who must prove his bona fides by contributing to a pool of pictures like those Black sought and distributed.

What Black distributed apparently is called "cyberporn." Thomas E. Weber, *For Those Who Scoff At Internet Commerce, Here's a Hot Market*, Wall St. J., May 20, 1997, at A1. Revenue from the adult cyberport market topped at least $50 million last year. *Id.* But the market Black participated in is far worse. Whether he acted for profit or for some other inexplicable reason, his activity still furthered the dissemination of child pornography and the victimization of children. The pornographic pictures are on the Internet because he put them there, and they may well remain in cyberspace in perpetuity. Bruce Black distributed child pornography, but despite the plain language of the Guidelines, his sentence does not reflect that. I would remand and instruct the district court to see that it does.

A true Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for
the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 9, 1997

BEFORE:

Honorable WALTER J. CUMMINGS, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

Honorable DIANE P. WOOD, Circuit Judge

Nos. 96-3497 and 96-3772

UNITED STATES OF AMERICA,
Plaintiff-Appellees, Cross-Appellant,

v.

BRUCE R. BLACK,
Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court for the Central District of Illinois. Danville Division No. 95 CR 20053, Harold A. Baker, Judge

The judgment of the District Court is **AFFIRMED**, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX C

UNITED STATES DISTRICT COURT

Central District of Illinois

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Sept. 27, 1996)
BRUCE R. BLACK	(For Offenses Committed On or After November 1, 1987)
	Case Number: 2:95 CR20053-001
	John H. Bisbee
	Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) **1 thru 9**

___ pleaded nolo contendere to count(s) _____ which was accepted by the court.

___ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 2252 (a)(2)	Distributing or receiving child pornography	10/28/1994	1-8
18 U.S.C. § 2252 (a)(4)(B)	Possession of three or more visual depictions of child pornography	08/22/1995	9

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____

X Count(s) _ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 334-58-0728
Defendant's Date of Birth: 01/29/1967
Defendant's USM No.: 10560-026

Defendant's Residence Address:

488 Malsbury Court
Rantoul IL 61866

Defendant's Mailing Address:

488 Malsbury Court
Rantoul IL 61866

09/27/1996
Date of Imposition of Judgment

/s/ Harold A. Baker
Signature of Judicial Officer

HAROLD A. BAKER
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

9/27/96
Date

DEFENDANT: BRUCE R. BLACK

CASE NUMBER: 2:95CR20053-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months(s) .

Said term shall consist of 18 months on each of Counts 1 through 9, to be served concurrently.

___ The court makes the following recommendations to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district:

__ at _____ a.m./p.m. on ____ .

___ as notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

X before 2 p.m. on 10/30/1996 .

___ as notified by the United States Marshal.

___ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

Deputy U.S. Marshal

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. 95-20053

BRUCE BLACK,

Defendant.

ORDER ON FINAL DISPOSITION

(Filed September 30, 1996)

On September 27, 1996, this case was before the court for final disposition. The government appeared through Colin Bruce, Assistant United States Attorney and Kathy McClure, trial attorney, United States Department of Justice. The defendant appeared personally accompanied by his attorney, John Bisbee.

The proceedings on final disposition have been protracted as the record shows. The court adopts paragraphs 1 through 102 of the presentence report as its findings in this proceedings with the exceptions of paragraph 36 to which the court has sustained the defendant's objection as stated in the court's tentative findings under U.S.S.G. § 6A1.3B). The government originally objected to the recommendation in paragraphs 33 and 40 of the presentence report that grouped the counts of conviction of determination of an offense level. The government has withdrawn that objection, to quote the United States Attorney, "in the interest of justice." The court adopts as

final its tentative findings on pages 2, 3, 4, 5, and 6 of Docket #66 but not paragraphs 8a, 9, and 10 on page 5, which are rendered moot by the government's withdrawal of its objection to paragraphs 33 and 40 of the presentence report.

Having heard the remarks of counsel and considered the present posture of the objections, the court makes the following findings. On the grouped counts, the court computes the base offense level at 15. The specific offense characteristic of two is added for the depiction of prepubescent minors. The court sustains the objection of five additional points for production, transportation, and possession with intent to distribute as shown in paragraph 36 for the reasons heretofore stated by the court. I believe the guidelines in plain language provide that in the absence of intent for pecuniary gain those points should not be added. The adjusted offense level is 17. Allowing two points for acceptance of responsibility, the total offense level is 15 and the defendant's criminal history category is I. The guideline sentence is 18 to 24 months. The guideline fine is $4,000 to $40,000. The defendant is not eligible for probation. The special assessment is $450, $50 on each count of conviction.

The court having heard the recommendations of the lawyers and the statement in allocation by the defendant orders the following disposition in the case for the reasons that are stated.

As an initial matter, I should like to express my respect for the United States Attorney's Office and the final position that they have taken in this very difficult matter. It shows once again, it is not a revelation or a

singular occurrence, the professional integrity of that office. I do respect them for that.

The policy against trafficking in any way in child pornography is clear. I agree with the majority of those circuit courts who have said that the primary victim is the child depicted and that the secondary victim is society as a whole. This particular defendant spent his time looking. He was passive. He didn't produce materials. He didn't sell them. He had no pecuniary motivation. He didn't commit any overt act himself. But his activity still furthered the dissemination of child pornography and therefore the victimization of children.

The defendant is at present embarked in a rather intense program of therapy which I intend to order continued. He does not have the financial ability to pay a fine. And, of course, he is subject to two years of supervised release on each count of conviction.

As I say, I respect the United States Attorney's Office and I respect their recommendation to me of 24 months. But the final burden rests with me, and I have to say that I think that 18 months for this defendant, plus the intensive therapy and continued supervision for three years, is a proper disposition in light of the ends of individual deterrence, general deterrence, and punishment. As in so many other cases I just hope I'm right in my assessment of the defendant.

It is the judgment of the court that the defendant is committed to the custody of the Attorney General of the United States, or her authorized representative, for the term of 18 months. He is further sentenced to a term of supervised release of three years. These sentences are on

the counts of conviction and are to be concurrent. No fine is imposed due to the defendant's financial position.

He is to report within 72 hours of his release to the probation office in the district in which he is released and enter on the term of supervised release. In addition to the standard terms of supervised release, he shall participate in psychiatric services or a program of mental health counseling treatment, to include participation in the sex offender treatment program as directed by the United States Probation Service and shall take any and all prescribed medications as directed by the treatment providers. He shall pay for these services as directed by the probation service. During the term of supervised release he shall have no unsupervised contact with minor children under the age of 18, including, but not limited to, personal, verbal, or contact by computer, or other communication methods. He shall not possess, distribute, or receive child pornography via on line computer or by any other means of communication. He is prohibited from owning, possessing, or using a computer other than for work related purposes or as he otherwise may be specifically authorized by the United States Probation Service.

He shall not own, possess, or purchase a firearm, ammunition, explosive device, or other dangerous weapon. He must pay the Clerk of the Court $450 in special assessments on the counts of conviction.

The property sought by the government for forfeiture is forfeited to the United States. An order shall be presented to the court for entry.

ENTER this 30th day of September , 1996.

/s/ Harold A. Baker

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	No. 95-20053
vs.	)	
BRUCE R. BLACK,	)	
Defendant.	)	

REPORT OF PROCEEDINGS
SEPTEMBER 27, 1997

BEFORE THE HONORABLE HAROLD A. BAKER

U.S. ATTORNEY'S OFFICE
201 South Vine Street
Urbana, IL 61801
For: The Government
BY: Mr. Colin S. Bruce

LAW OFFICE OF JOHN H. BISBEE
437 North LaFayette Street
Macomb, IL 61455
For the Defendant
BY: Mr. John H. Bisbee

MATTHEWS COURT REPORTING

659 East Meyers Street
Monticello, IL 61856
(217) 762-3811 * (800) 262-3396

Holly Wingstrom, CSR #084-003888

[p. 2] **SEPTEMBER 27, 1996**

CLERK: This is 95-20053 United States of America versus Bruce R. Black.

THE COURT: State your appearances, Government.

MR. BRUCE: Colin Bruce on behalf of the United States accompanied by Kathy McClure from the Department of Justice, Child Exploitation and Obscenity Section.

THE COURT: For the Defendant?

MR. BISBEE: John Bisbee on behalf of the Defendant, and the court record should reflect that Mr. Black likewise is present in person.

THE COURT: This is the continued hearing entitled "Final Disposition" in the case. I have received the written responses of both the Government and the defendant and reviewed them.

I have one additional observation of my own that has arisen through discussions with the reporting probation officer and a consideration of re-examination of the allotment of offense level additions for prepubescent children being depicted in the images which are the subjects of the various counts of the indictment.

The report or the information that the court has from Dr. Buetow's examination would indicate that, with the exception of Count III, prepubescent children are

* * *

[p. 8] negotiated in any manner whatsoever.

I will tell the Court that in the future the next time that our office is involved in a case as rare [sic] this one, hopefully we will be; we will do more thorough research on the grouping issue.

The third point she would like me to point out is also that this area is so esoteric that not even the probation officer thought about this until the Government raised its objections.

THE COURT: I accept everything you say, and I don't doubt for one second that the United States Attorney's Office and you acted in the best of faith. If I thought otherwise, I would take appropriate steps. I am confident that you acted in good faith.

But what I am trying to, I guess, get across to you is going straight to the bottom line. Isn't a year and a half sentence for a defendant like this, under the particular facts and intensive therapy, he has made no attempts predation, then no attempt at financial gain, isn't that a sufficient disposition that you can hold your head up high with to work deterrence and individual punishment? And that additional consideration plus this mutual misunderstanding or misapprehension or whatever you want to call it should enter into your thinking. I

* * *

[p. 11] We'll have another recess. Mr. Russell, would you come to chambers.

(Whereupon the Court took a recess.)

THE COURT: Having heard the remarks of the United States Attorney, the Court makes the following

amendments to its findings which will ultimately be reflected in the Court's written orders of final disposition:

The Court computes the base offense level at fifteen. The specific offense characteristic of two is added for the depiction of prepubescent minors.

The Court suspects the coercion of five additional points for production, transportation and possession with intent to distribute as shown in paragraph 36 for the reasons heretofore stated by the Court: That I believe the guidelines in plain language provide that in the absence of pecuniary gain or the intent for pecuniary gain, those points should not be added.

The adjusted offense level is seventeen allowing two points for acceptance and responsibility. The total offense level is fifteen. The defendant's criminal history category is one. The guideline sentence is eighteen to twenty-four months. The guideline fine is $4,000 to $40,000. He is not eligible for probation and

* * *

This particular defendant spent his time looking. He didn't produce the materials. He didn't sell them. He had no pecuniary motivations. He didn't commit any overt act himself.

But the activities still further the dissemination of child pornography and therefore further result in the victimization of children.

The Defendant is at present embarked in a rather intense program of therapy, which I intend to order continued. He doesn't have the financial ability to pay a fine.

And of course he is subject to three years on each count of conviction and three years of supervised release.

* * *

It is the judgment of the court that the defendant be committed to the custody of the Attorney General of the United States or her authorized representative for the term of eighteen months. He is further sentenced to a term of supervised release of three years. These sentences are on the counts of conviction and are to be concurrent. Three years supervised release.

He is to report within seventy-two hours of his release to the probation office in the district in which he is released and enter on the terms of supervised release.

In addition to the standard terms of supervised release he shall participate in psychiatric services or a program of mental health counseling treatment to include

* * *

Now, the motion to be enlarged on bail pending appeal. There is in this case, I believe a statutory provision, 18 U.S.C. 3143(b)2, appears to require the Court to detain the Defendant because of the nature of the crime he has been found guilty of.

* * *

Is there a substantial question in this case? The Defendant asserts that he is being punished because he is an unbidden pedophile or ephebophile. He isn't. I have made that quite clear in the rulings. He is punished, he is prosecuted because he possessed, transmitted and received child pornography. That is the offense. Not that

he is a pedophile or even an ephebophile. and his claim that he did it because he couldn't help himself is not going to result in a reversal [p. 32] or a change in sentence.

The motion to be enlarged on bail pending appeal is denied because the appeal doesn't raise a substantial question of the law.

The defendant is directed to surrender himself. I see no point in taking him into custody at this point. He has been on bail and he can surrender himself within thirty days. He is to surrender himself to the institution designated by the Department of Justice on October 30 at 2:00 p.m. His bail is to remain in force in the interim.

Now you can go to the Court of Appeals and see if they disagree with that and they will enlarge him on bail.

MR. BISBEE: I understand. Thank you, Your Honor.

THE COURT: Anything else to come before the Court at this time?

MR. BISBEE: No, Your Honor.

THE COURT: The court is in recess.

(Whereupon the Court recessed.)

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
PLAINTIFF,
VS. 95-CR-20053
BRUCE BLACK,
DEFENDANT.

ORDER ON . . . TENTATIVE FINDINGS AND RESOLUTION OF DISPUTED FACTS PURSUANT TO U.S.S.G. §6A1.3(b)

(Filed Sep. 19, 1996)

I.

The government filed an objection to the recommended adjusted offense level in paragraph 40 of the presentence report. The government argues that the offenses in the separate counts should not be grouped but considered individually for purposes of determining the appropriate offense level. The defendant moved to strike the objection because it violated the plea agreement or, alternatively, during oral argument, to permit the defendant to withdraw the plea agreement.

* * *

11. The defendant was not suffering from diminished mental capacity[1] at the time he committed the

[1] See Dr. Kelly's report.

offenses and does not qualify for a downward departure under U.S.S.G. §5K2.13 is not appropriate. In the same vein, mental and emotional conditions [pedophilia/ephebophilia] are not appropriate reasons for departure. See U.S.S.G. §5H1.3.

The defendant's "heartland of the guidelines" argument is predicated on the idea that he is an atypical offender. Does he mean that he is atypical of the pedophile/ephebophile who is driven to collect child pornography? It is apparent to the court that the consumer in the child pornography market would likely be someone who had mental or emotional tendencies similar to the defendant's and that his tendencies are certainly not unique. The senseless nature of the defendant's argument is illustrated by considering other conduct judged criminal by society. Consider the rapist who is driven by the involuntary lust for sexual gratification with pubescent girls, or driven by an involuntary phobia about elderly women. Consider the thief who is driven by involuntary kleptomania. Consider the vehicle operator who commits manslaughter because he is in the clutches of involuntary chemical substance dependency. The mental or emotional state of those offenders would not constitute a defense to prosecution and certainly would not be grounds for a departure from the sentencing guidelines.

The court will adopt paragraphs 1 through 102 of the presentence report, with the exceptions of paragraph 36 and paragraphs 33 and 40, as the court's findings in these final disposition proceedings.

The parties must file any written objections to the court's tentative findings no later than 8:00 a.m., September 27, 1996, and may do so by facsimile transmission.

The case is set for final disposition and rulings at 1:30 p.m. on September 27, 1996, in Urbana.

Enter this 19th day of September 1996.

/s/ Harold A. Baker
Harold A. Baker
Senior United States
District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	CRIMINAL NO.
BRUCE R. BLACK	)	95-20053
	)	
Defendant.	)	

STIPULATION

(Filed Jun. 3, 1996)

The parties hereby stipulate and agree that at all times material to the indictment the defendant, Bruce R. Black, was a pedophile and/or ephebophile and the receipt, collection and distribution of child pornography was a pathological symptom of the defendant's pedophilia and/or ephebophilia.

Respectfully submitted,

FRANCES C. HULIN
United States Attorney

By: /s/ Colin S. Bruce
COLIN S. BRUCE
Assistant United States Attorney

/s/ Bruce R. Black
BRUCE R. BLACK
Defendant

/s/ John H. Bisbee
JOHN H. BISBEE
Attorney for Defendant

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
DANVILLE/URBANA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CRIMINAL NO. 95-20053
BRUCE R. BLACK	)	
Defendant.	)	

STIPULATION

(Filed Jun. 3, 1996)

The parties stipulate and agree that at all times material to the indictment, the defendant, Bruce R. Black, did not receive, collect, or distribute child pornography for commercial purposes or monetary gain.

The parties further stipulate and agree that at all times material to the indictment, the defendant, Bruce R. Black, did not trade child pornography on a numerically equal basis with other individuals who received, collected or distributed child pornography.

Respectfully submitted,

FRANCES C. HULIN
United States Attorney

By: /s/ Colin S. Bruce
COLIN S. BRUCE
Assistant United States Attorney

/s/ Bruce R. Black
BRUCE R. BLACK
Defendant

/s/ John H. Bisbee
JOHN H. BISBEE
Attorney for
Defendant

APPENDIX I

June 3, 1996

Mr. John H. Bisbee
Attorney at Law
437 N. Lafayette Street
Macomb, IL 61455-1550

VIA FACSIMILE, UNITED STATES MAIL AND HAND DELIVERY

(Filed Jun. 3, 1996)

Re: United States v. Bruce R. Black

Dear John:

Pursuant to our discussions of Thursday and Friday, May 30 and 31, this letter is to formalize the agreement surrounding the stipulation regarding Mr. Black's status as a pedophile and ephebophile.

The United States will *not* argue in any subsequent proceeding or manner that Mr. Black voluntarily chose to become a pedophile or ephebophile. My understanding from talking to the United States's expert, Dr. Kelly, is that an individual may not voluntarily choose to become a pedophile or ephebophile in the same manner that a person may not simply voluntarily choose to become a claustrophobic or an agoraphobic. Likewise, a pathological symptom of *Mr. Black's* pedophilia or ephebophilia was the collection of child pornography.

The United States will, however, continue to argue that Mr. Black voluntarily chose to receive, collect and distribute child pornography, and voluntarily chose the manner and means by which it was received, collected and distributed. Furthermore, the United States will continue to

argue that Mr. Black's conduct in this regard was done knowingly and intentionally. The dispute over this aspect of Mr. Black's conduct is really one of the critical issues in our case.

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs. No. 95-20053

BRUCE R. BLACK,

Defendant.

ORDER

(Filed Jun. 4, 1996)

This matter is before the court for a pretrial conference under Federal Rule of Criminal Procedure 17.1. The United States appears through Colin S. Bruce, Assistant United States Attorney. The defendant appears personally accompanied by his attorney John Bisbee.

The government has filed a witness and exhibit list and delivered copies to the defendant.

There is pending a number of motions *in limine*. The government has moved to preclude the defendant from offering opinion evidence, so-called expert witness evidence, on the defendant's stipulated condition of pedophilia or ephebophilia as a defense in the case. After extensive colloquy with the Assistant United States Attorney who is prosecuting the case and with defense counsel, it is clear that the defendant is not claiming insanity as a defense as that term is defined in 18 U.S.C. §17. The defendant does not contend, within the meaning of Section 17, that his psychological condition of pedophilia or

ephebophilia rendered him unable to appreciate the nature and quality of wrongfulness of his conduct. He does contend that he did not understand his acts were illegal or unlawful. It is clear from Section 17 that such a position does not constitute a defense to the crime charged. The government's motion *in limine* then to exclude testimony about the defendant's condition of pedophilia or ephebophilia is allowed because that evidence is irrelevant.

The further aspect of the government's motion *in limine* asks that the defendant be precluded from arguing to the jury that he did not understand his conduct was illegal or that he was acting in an unlawful manner. The portion of the motion to exclude evidence and argument on that point is also allowed. The element of the offense that must be proved by the government is knowledge, not that the defendant acted willfully in contravention of a known statutory prohibition. Willfulness in that sense is not an element in this case. Knowledge is, as defined in the standard jury instruction about acting knowingly.

I make this order in light of and accepting the stipulations of the parties that have been filed in the record.

The motion by the defendant *in limine* is denied. The defendant has also filed a series of motions asking for explanation of the court's ruling denying the motion to dismiss the indictment. I don't understand all those motions. To the extent that the defendant thinks the court excluded some sort of proffer on his part, I accept those proffers. I had all the defendant's materials before me when I considered the motions. I saw the tender of the

proposed additional examination of the government psychiatrist, and assuming that all that material was before the court, my ruling remains the same.

Enter this 4th day of June 1996.

/s/ Harold A. Baker
Harold A. Baker

Senior United States District Judge

APPENDIX K

[p. 61] UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
DANVILLE DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	Case No.:
BRUCE R. BLACK,	)	95-20053
Defendant.	)	

REPORT OF PROCEEDINGS

DATE: JUNE 3RD, 1996
HEARING ON ALL
PENDING MOTIONS
BEFORE: HAROLD A. BAKER
Judge Presiding

APPEARANCES:

FOR THE GOVERNMENT: MR. COLIN BRUCE
Assistant U.S. Attorney
201 S. Vine
Urbana, IL 61801

FOR THE DEFENDANT: MR. JOHN H. BISBEE
Attorney-at-Law
437 N. Lafayette Street
Macomb, IL 61455

Toni M. Judd
U.S. Court Reporter
201 South Vine
Urbana, Il 61801
(217) 373-5830

[p. 62] THE CLERK: United States of America v. Bruce Black, 95-20053.

THE COURT: State your appearance for the United States.

MR. BRUCE: Colin Bruce and Kathy McClure on behalf of the United States.

THE COURT: For the defendant.

MR. BISBEE: John Bisbee on behalf of Mr. Black, who is also present.

THE COURT: All right. This is a conference under 17.1 and there are a number of motions. The government, I think, has a *motion in limine*. The defendant just filed one. And I also have the government's witness list and exhibit list.

* * *

[Pending Sentencing]

THE COURT: I gather without going through this, that you really have no objection to his being enlarged on bail? Do you have any – I should ask probation, any indication of his being a predator or offering a threat to the community?

MR. BRUCE: Judge, are you asking me?

THE COURT: Yes, you are the United States Attorney.

MR. BRUCE: I thought you were speaking to the Probation Officer. I am sorry.

THE COURT: I said do you know of anything through the probation officer. The probation officer who was here left.

MR. BRUCE: I thought he was still here. I [p. 95] apologize. Our position on whether he remains on bond or not, Mrs. Hulin has asked me to be very specific about this that is why I filed a written pleading. Under the statue, it is mandated that he be detained upon pleading guilty. However, there are exceptions, and I laid out the statutory formula in the pleading. If the court wishes to have Mr. Black out on bond, the court will need to find exceptional reasons why detention of the defendant is inappropriate, and I have been directed to advise you that the position of the United States is that it is within your sound discretion. I believe Mr. Bisbee may have arguments to provide to the court to find reasons.

THE COURT: I would like to confer with probation. And I know of no information indicating that Mr. Black does anything but watch. I would be interested to know if there is any indication of being a predator, and I am a person who used that term.

The clerk tells me you don't want to enter the plea today. Is that wrong?

MR. BRUCE: Judge, we will do it whenever you choose to do it.

MR. BISBEE: We didn't want to create the necessity whereby you had to call a jury.

THE COURT: The jury is coming, but it effects us how many jurors. We will summon the whole venire if we

* * *

[p. 110] and the matter is allotted for final disposition –

THE CLERK: – September 18th at 1:30.

THE COURT: All right. There comes the question now of being enlarged on bail pending final disposition. The government has supplied the court with its position on detention or release of the defendant. Mr. Russell and Mr. Nebergall, does the Probation Service have any information from its supervision of Mr. Black during his period of time that he is a predator or has committed any acts that would constitute a threat to society?

MR. NEBERGALL: Judge, Miss Auger is unavailable today, and I perused the chronologicals up until today and I could not see anything in there that would go to what you have addressed

THE COURT: Finding by the court that the evidence is clear and convincing that the defendant will not flee and he offers no overt threat to society. There is the question, too, of his continued cooperation with the government and his, he is continued enlarged on bail pending final disposition. Anything else?

* * *

MR. BISBEE: Do I understand that the defendant's motion for release pending appeal, disposition of the appeal will be heard at the later time?

THE COURT: One step at a time. He is released pending final disposition and we will have to cross that bridge when we come to it.

MR. BISBEE: All right.

APPENDIX L

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

PLAINTIFF,

VS.

BRUCE R. BLACK,
DEFENDANT.

ORDER

(Filed May 09, 1996)

The defendant is under indictment for violation of 18 U.S.C. §2252 (activities relating to material involving the sexual exploitation of minors). He is charged with distribution, receipt and possession of child pornography. The defendant has moved to dismiss the indictment and argues that:

(1) The indictment seeks to punish him for engaging in activities protected under the First Amendment;

(2) The indictment seeks to punish him for being a pediophile in violation of the Eighth Amendment;

(3) The indictment seeks to punish him for an offense that doesn't require knowledge by the defendant of the criminal nature of his conduct; and, (4) the indictment is time barred.

The defendant requested and received an evidentiary hearing in support of his arguments. He also submitted a

written proffer off evidence as additional support for his arguments.[1] Taking that evidence in the light most favorable to the defendant for the purposes of this motion, but without deciding the factual questions he raises, the court assumes certain points. First, the defendant is a pedophile. Second, between September 1994 and August 1995, the defendant transmitted, received and possessed a collection of child pornography on his personal computer through a commercial service providing access to the Internet. Third, he used that collection as visual stimulation for his sexual fantasies and gratification. Fourth, he did all this in the privacy of his home.

Child pornography is not entitled to First Amendment protection if the prohibited conduct is sufficiently described. *New York v. Ferber*, 458 U.S. 747, 762 (1992). The criminalization of possession, transmission and receipt of child pornography under §2252 serves a compelling government purpose. "It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing the demand." *Osborne v. Ohio*, 495 U.S. 103, 109-10 (1990). It is equally clear that commercial motive is not a necessary ingredient of the offenses of possession, transmission and

---

[1] It appears that in this criminal case the defendant is seeking a summary judgment of acquital [sic] as a matter of law, much as a party in a civil case might seek summary judgment under F.R.Civ.P. 56. That is, of course, a procedure unknown in the criminal practice. Certainly the court could not decide upon the credibility of the two psychiatrists who testified at the evidentiary hearing or decide fact issues before the government had put on its evidence.

receipt of child pornography. *United States v. Andersson*, 803 F.2d 903, 906 (7th Cir. 1986). Reliance by the defendant upon *Stanley v. Georgia*, 394 U.S. 557 (1969) as the linchpin of his First Amendment argument is misplaced. *Stanley* is a case about the receipt of information and ideas; Mr. Black's case is about preventing the sexual exploitation of children by punishing the receipt, transmission and possession, of child pornography. The court finds no merit in the defendant's First Amendment arguments.

The Eighth Amendment argument is also without merit. The defendant is not singled out for prosecution because he is a pedophile. He is prosecuted because it is alleged he transmitted, received and possessed material depicting children engaging in explicit sexual conduct. Assuming that the condition of pedophilia is unbidden, as the defendant's psychiatrist testified, it would not constitute a defense to the charged offense. Assuming further that the collection of child pornography was necessary to the unbidden condition, there is still no defense to the criminal conduct alleged in the indictment. Explaining its decision in *Robinson v. California*, 370 U.S. 660 (1962) the Supreme Court in *Powell v. Texas* said:

> The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms has committed some *actus reus*. It does not deal with the question of whether certain conduct cannot constitutionally

> be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

Powell v. Texas, 392 U.S. 514, 533 (1968)

The statute of limitations on the charged offenses bars them after a period of five years. 18 U.S.C. §3282. The conduct which is the subject of the prosecution took place between September 1994 and August 1995. The indictment was in 1995. No statute of limitation question is involved. The defendant is not charged with the creation of the child pornography but with its possession, transmission and receipt. The argument about limitation arising with the creation of the pornography is frivolous.

Finally the defendant argues that he didn't know he was committing a criminal act by receiving, transmitting or possessing child pornography and that he had no commercial motive in his activities. That argument has been previously met and rejected by the courts. *Hamling v. United States*, 418 U.S. 87, 123 (1974) held that it was unnecessary to prove a defendant's knowledge that it was illegal to distribute obscene materials. Knowledge of the nature of the materials was sufficient. The Third Circuit adopted that analysis in dealing with the issue of knowledge in a child pornography prosecution. *United States v. Knox*, 32 F.3d 733 (3rd Cir. 1992) held that "to fulfill the knowledge element of §2252, a defendant simply must be aware of the general nature and character of the material and need not know that the portrayals are illegal. *Id.* at 754. *Accord, United States v. Moncini*, 882 F.2d 401, 404 (9th Cir. 1989). Nothing in the statute suggests a requirement that a defendant have the specific intent to

violate the law. All that is required is that the defendant act knowingly.

It is ordered that the defendant's motion to dismiss the indictment and his supplemental motion are denied. It is further ordered that the defendant's motion for further evidentiary hearing in support of his motions is denied. The case is set for jury selection and trial on June 4, 1996 at 9:00 a.m. before the court sitting in Urbana.

Enter this 9th day of May 1996.

/s/ Harold A. Baker
Harold A. Baker
Senior United States
District Judge

APPENDIX M

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 29, 1996

Before

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 96-3497 v. BRUCE R. BLACK, Defendant-Appellant.	Appeal from the United States District Court for the Central District of Illinois, Danville Division. No. 95 CR 20053 Harold A. Baker, Judge. (Filed Oct. 11, 1995)

Upon consideration of:

1. "EMERGENCY MOTION PURSUANT TO RULE 9(b) F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL" filed on October 15, 1996, by counsel for appellant;

2. "MEMORANDUM IN SUPPORT OF 'EMERGENCY MOTION PURSUANT TO RULE 9(b) F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL' " filed on October 15, 1996, by counsel for appellant;

3. "RESPONSE TO DEFENDANT-APPELLANT'S EMERGENCY MOTION PURSUANT TO RULE 9(b)

F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL" filed on October 23, 1996, by counsel for appellee; and,

4. MEMORANDUM IN SUPPORT OF THE UNITED STATES RESPONSE TO THE DEFENDANT-APPELLANT'S EMERGENCY MOTION PURSUANT TO RULE 9(b) F.R.A.P. AND CIRCUIT RULE 9(b) FOR RELEASE PENDING APPEAL, filed on October 23, 1996, by counsel,

IT IS ORDERED that #1 is **DENIED.**

APPENDIX N

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 14, 1996

Mr. John Bisbee
437 North Lafayette Street
Macomb, IL 61455

Re: Bruce R. Black
v. United States
Application No. A-355

Dear Mr. Bisbee:

The application for release pending appeal in the above-entitled case has been presented to Justice Stevens who on November 14, 1996, denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Cynthia Rapp
Cynthia Rapp
Assistant Clerk